

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALAN CASE)	
Claimant)	
VS.)	
)	Docket No. 190,066
McGINTY MACHINE COMPANY, INC.)	
Respondent)	
AND)	
)	
NORTHWESTERN NATIONAL CASUALTY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on July 18, 1997. The Appeals Board heard oral argument December 12, 1997.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James A. Cline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Steven L. Foulston of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record identified in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found that claimant's alleged injury of June 28, 1993, was a temporary aggravation of a preexisting injury but did not result in permanent impairment. On appeal claimant contends he should be granted benefits for a permanent disability. Respondent, on the other hand, contends that claimant has failed to prove any accident arising out of and in the course of employment and has failed to establish that he gave timely notice of such an accident. The respondent also contends that claimant's award, if any, should be limited to medical benefits only on the basis of the language of K.S.A. 1992 Supp. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. ____ (1996). Respondent initially asserted, on appeal, that claimant also failed to make a timely written claim. At the time of oral argument, respondent withdrew this issue. Accordingly, the issues now before the Appeals Board are:

- (1) Whether claimant established accidental injury arising out of and in the course of employment.
- (2) The nature and extent of claimant's disability, if any.
- (3) Whether claimant gave timely notice of accident.
- (4) Whether claimant has met the requirements of K.S.A. 1992 Supp. 44-501(c) that he be disabled from employment for a period of at least one week from earning full wages.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed.

Claimant alleged and testified that he injured his midback in June of 1993 while lifting a vise in the course of his duties for respondent. Although there was substantial confusion about the precise date, claimant ultimately concluded that the injury would have been on June 28, 1993. In addition, respondent has not shown prejudice as required by law in effect at the time. K.S.A. 1992 Supp. 44-520. Claimant notified his supervisor that his back was hurting that day. Respondent filed no report of accident and claimant filed the claim on May 26, 1994, less than one year after the alleged injury.

As the Administrative Law Judge noted, claimant had problems with his back for approximately eight years prior to the alleged date of accident. Claimant initially testified, however, that he had not had any prior injuries to his back. He later acknowledged that he had injured his back in November of 1992, while employed by another employer. The record showed, and claimant acknowledged, that this previous injury also occurred while claimant was lifting a vise.

The Administrative Law Judge found the record does establish that claimant suffered a temporary aggravation of preexisting injury in June of 1993. The Appeals Board agrees. Claimant testified to an increase of symptoms at that time. He sought medical treatment through his chiropractor. Although he did not miss work initially after the injury, he began having problems again and respondent told him to take two weeks off and then bring a release form authorizing his return to work. The Appeals Board finds claimant established that he was disabled for a period of at least one week from earning full wages. Accordingly, he would be entitled to permanent disability benefits if the record established that he suffered permanent disability from the alleged accident. K.S.A. 44-501(c).

Claimant argues the record contains uncontroverted evidence that claimant suffered permanent injury as a result of the accident in June 1993 while working for respondent. Claimant points out that claimant testified that he suffered additional symptoms as a result of the lifting incident in June of 1993. Claimant also points to the testimony by Dr. Pedro A. Murati. Dr. Murati rates claimant's impairment as 3 percent to the body. Dr. Murati, who did not see claimant until three years after the alleged accident, testified that if claimant's version of the events is believed, claimant's 3 percent impairment results from the injury in June of 1993 while working for respondent.

The Appeals Board does not, however, consider the evidence to be uncontroverted. None of the medical records following the alleged date of accident contain any reference to an accident in the course of employment for respondent. The records refer to the accident in November of 1992 while working for a different employer. The absence of any such history does, in the Board's view, contradict claimant's testimony. The opinion by Dr. Murati depends solely on the history claimant gave him three years later while the workers compensation claim was pending. The opinion of Dr. Murati does not, in the Board's view, satisfy claimant's burden in light of the absence of such a history in the contemporaneous records.

For the above and foregoing reasons, the Appeals Board finds that the conclusions of the Administrative Law Judge that claimant suffered a temporary injury only should be affirmed. The findings of fact and conclusions of law by the Administrative Law Judge are hereby incorporated as findings and conclusions by the Appeals Board.

AWARD

WHEREFORE, the Appeals Board finds that the Award by Administrative Law Judge Jon L. Frobish, dated July 18, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
James A. Cline, Wichita, KS
Steven L. Foulston, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director